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THE RIGHT TO COLLECTIVE BARGAINING: DOES IT REQUIRE GOVERNMENT INTERFERENCE OR ABSTENTION?

1. Introduction

Labour law is predominantly the result of historical and economical developments. Andrzej Świątkowski has shown this in many of his national and international publications and also in the "Studia z zakresu prawa pracy i polityki społecznej" which he has edited for so many years.

In this paper I will describe the Dutch rules on collective bargaining as an example on how these are based on historical developments and how they are challenged at present by new developments. As Andrzej Świątkowski has often shown in his publications, international standards are becoming more and more important to assess the application of the current rules and this may lead to the need for government interference in the not too far away future.

2. The Dutch system of labour relations and collective bargaining

The Dutch Playing Field of Collective Bargaining

Also in the Netherlands freedom of association did not exist from the beginning of labour relations. Until 1872 the Dutch Criminal Code prohibited employers and employees to try to reach lower or higher wages by means of their respective associations (prohibition of coalition). Since 1872 the freedom of association and collective bargaining has been respected — apart from some long lasting problems in the public sector (which have been solved in the meantime).

Currently there is full freedom of association and negotiation. This means that no requirement of prior permission by the government is required for establishing a union.

The negotiation system (collective bargaining) is wholly based on voluntary negotiations. Thus there are neither statutory provisions concerning the right to negotiation nor on the question which organisations can participate in the negotiations. Once a collective agreement is concluded there are statutory rules on its effects and on extending the agreement. So government interference concerns the *product* of the negotiations.

This lack of a statutory framework for negotiations implies that it is left to the power play of both sides of industry to decide who can participate in the negotiations. If a trade

union files an application at a court for an order to be admitted at particular negotiations, it is usually rejected, since the court considers interference in the light of freedom of negotiations, which means that it should not interfere. In only extreme cases courts have interfered, i.e. if a workers organisation representing a very high level of workers (90 per cent) is excluded from the negotiations.[1] The main rule is that admittance to the negotiation table cannot be enforced.

When asked for advice in 1979, the Dutch Social-Economic Council rejected the idea of a statutory regulation for negotiations. Consequently, potential negotiation partners have to gain admittance to the negotiations by their force: the number of their members and their preparedness to start collective action. In practice the large unions and, if they exist, smaller branch unions are involved in most negotiations. The unions who agree with the outcome, sign the collective agreement. Also at the employers side there can be several signatory parties.

In this system it can happen that an employer or employers' organisation make a collective agreement with one or more unions, while a large union, with many members in a particular enterprise or sector, is not involved. This may happen if it is not invited for negotiations or, more likely, if a union left the negotiation table since it was not satisfied with the progress or outcome. Nothing prevents the remaining parties from concluding the agreement; it is fully valid and it has full legal effect. So far exceptions to this general principle have been limited to cases where a union, according to its constitution, explicitly and exclusively has to represent the higher cadre; a court decided that this was not allowed to make a collective agreement for the workers not belonging to this category.[2]

The legal effects of collective agreements

In the Act on Collective Agreements provisions the legal effect of collective agreements is regulated. In this respect it is relevant to distinguish between provisions on the contents of the labour conditions, including wages, and other provisions. These other provisions concern, among other ones, the relation between the social partners, such as their obligation to respect the agreement during its agreed duration and not to start collective actions during this period. An employee who is bound by this agreement can ask enforcement of the former type of provisions before court. Collective agreements can be made sector wide but also for a particular enterprise.

For a worker a collective agreement has full effect only if it is concluded by his employer (or an employers' organisation of which his employer is a member) and a union of which the employee concerned is a member. We will call this person a bound employee, i.e. bound by the collective agreement. A bound worker can invoke the collective agreement before court. Also the trade union can go to court to defend the interests of this worker. This effect of the collective agreement is based on the Act on Collective Agreements (Articles 12 and 13).

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1 Court of Utrecht, 31 December 1986 and 4 November 1987, *NJ* 1988/676.

2 Court of Amsterdam, 29 December 2005, *JAR* 2006/27.

Provisions of a collective agreement overrule provisions of a contract of employment if they are inconsistent with the latter and they supplement other provisions. Thus if an employee is awarded a wage of 2000 euros a month in his contract and the collective agreement mentions 2300 euros, the latter provision is valid.

Both employers and employees can join a collective agreement during its validity period by becoming member of a signatory party of the agreement; they are treated as if they were already member or signatory before the agreement came into force.

In a so-called standard collective agreement deviation from the provisions of the collective agreement is not allowed. This means that employees cannot be paid a higher wage or be given better work conditions than defined in the collective agreements. The effect of such standard collective agreement is that it prevents employers from competing with each other to attract each other's employees. This is, in particular, important in a tight labour market.

Another type of a collective agreement is a minimum collective agreement; this type allows negotiating by the individual of better conditions. If his contract does not mention any number of holidays, the number mentioned in the collective agreement applies (provided the statutory minimum is observed).

A second group of workers concerns employees who are not a member of a trade union themselves, but who are employed by an employer who signed the collective agreement or who is a member of the organisation which signed it. This employer has to apply the collective agreement also to employees who are not a member of a trade union. Thus, in the dilemma between allowing free riders and bringing employers in the temptation not to employ union members, the Dutch system has opted for the first way. If a collective agreement would apply to union members only (i.e. members of a signatory party) the employer could be tempted not to employ union members and thus the collective agreement would be undermined.

Article 14 of the Act on Collective Agreements realises this effect for the bound employer and unbound employees. Thus an employer who is bound by a collective agreement is obliged during the course of this collective agreement to apply the labour conditions of the collective agreement also to those who fall within the personal scope of the collective agreement but who are not a union member, unless the collective agreement provides otherwise. However, the employer and employee concerned can agree that they deviate from the collective agreement.

Only bound workers can invoke a collective agreement before court; the unbound worker cannot. In case of unbound workers only a signatory party can require that the collective agreement is followed. Trade unions may indeed take such a step in order to prevent union members from becoming less attractive for the employer than non-union members.

If an employer is not a signatory party or not a member of such party he is not bound by a collective agreement. Still many employers apply the collective agreement that is made for their sector as they consider this as convenient: they do not have to negotiate on working conditions themselves and there is no competition on wages with other companies.

The employer can refer to collective agreements by referring in individual agreements of his employees to a collective agreement. If a contract refers to a collective agreement the employee can realize enforcement of the collective agreement.

Extension of the collective agreement erga omnes

As we saw in the previous section, an employer who is not a signatory party or member of a signatory party is not bound by the collective agreement and does not have to apply it to his employees. Since this can be undesirable from the point of view of labour relations and prevention of social dumping, an additional act was made in 1937, the Act on general extension of collective agreements. This Act empowers the Minister of Social Affairs to declare specific provisions of a collective agreement generally binding. In principle, only the provisions on working conditions can be extended.

The minister can extend the collective agreements only upon a request of the signatory parties and if the collective agreement covers an important majority of the workers in the sector concerned. For this test also those employees count who are covered by Article 14.

According to the policy rules of the minister a majority of 55 per cent is sufficient unless support of this agreement is low (e.g. if there are protests of workers since they consider the result insufficient). If 60 per cent is covered it is in any case assumed that there is an important majority. There are also provisions which will not be declared generally binding, such as closed-shop provisions and provisions which distinguish between union members and non-union members.

It is possible to exempt a collective agreement made for a particular enterprise from general extension of the sector collective agreement.

If a collective agreement has been declared erga omnes, all employers working in the sector concerned have to apply the collective agreement on workers falling within the personal scope of this agreement, unless they are exempted from it. All employees covered by the extension can now invoke the collective agreement, also before court; it is no longer relevant whether they and their employer are bound by it.

The System Put into Perspective

Although unions have to defend, of course, the interests of the workers and there is competition among them, this does not mean, unlike in other countries, that they make high wage claims in order to get a better profile in the negotiations. One reason for this may be a historical one: unions were traditionally based on religious denominations (catholic, protestant, social-democratic etc.) and this determined to a large extent the choice of a worker for a particular union. Although at present this has become of much less interest, unions are still not seen as simply competitors in terms of wage claims, but they are differentiated by having different approaches in negotiations and collective actions, and workers make their choice on basis of their preferred approach.

Still, in conflict situations employers may look for the more moderate unions to try to convince such a union to make an agreement. In this situation, however, unions are

often concerned to maintain their reputation of being cooperative and of striving for long term social peace. This explains why they are not often willing to agree in excluding another union. In fact this happens most often if the negotiations are confronted by a problem which is difficult to overcome and one union remains unwilling to agree with a compromise.

3. International Standards

In this section only the most important international standards are mentioned.

Relevant to the freedom of association is ILO Convention 87, which concerns the Freedom of Association and Protection of the Right to Organise and Convention 98 concerning the right to organise and collective bargaining.

Article 2 of Convention 87 provides that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Article 3 provides that the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 1 of Convention 98 provides that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

Article 4 provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements

Also the Council of Europe developed standards on the freedom of association. Article 11 of the Convention on Human Rights provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Interesting in this respect is the *Wilson-judgment*.[3] In this case the court decided that although Member States have a large margin of discretion to realize freedom of association in some cases the Government has to interfere. This is the case when the freedom to be represented is affected seriously by one of the parties.

In addition Article 6 of the European Social Charter is relevant, which governs collective bargaining and collective actions.

ILO Convention 87 does not mention the right of negotiation, but the Committee of Experts argued that for a trade Union the right of collective bargaining is essential for its

[3] ECHR 2 July 2002, *Wilson*.

functioning, so that this must not be infringed.[4] Also Article 4 of Convention 98, quoted above, is relevant to collective bargaining.

The right of collective bargaining following from the mentioned ILO conventions exists in relation to the government only. The unions can therefore not invoke an enforceable right to negotiate against employers.

Also Article 11 of the ECHR is aimed at the Government. Article 11 does not have horizontal effect and can therefore have very limited effect only, i.e. if the circumstances are such that the Government is forced to interfere. Furthermore the Government has a large range of discretion how to give social partners protection and this protection can be rather limited.[5] Collective bargaining is not seen as a requirement for union freedom and there is no obligation for an employer to recognise a union. Since an obligation to negotiate would imply an infringement of the right not to negotiate the Court is cautious in this area.[6] In the *Wilson* judgment the Court gave a certain positive obligation for the Government to undertake action in cases where otherwise the freedom of trade unions would become illusory. In this case the financial results of being a union member were so large that in fact the right to be represented by a union had become void (illusory) and therefore the rights of both union and union members were infringed.

4. International standards and the Dutch system of collective bargaining

In the Dutch system there are no requirements on the representativity of unions. Unions can be excluded from negotiations. Non-bound union members can be made subject to collective agreements, even if this means derogation from statutory provisions where this is allowed by these provisions.

Although the system works quite well and has enabled social peace and productivity for many decades it is not without challenges. These are becoming more urgent since workers are less linked with particular ideologies and organisations than in the past. A second development is that it may be easier for the unions to attract members by modern media, including internet. The first 'internet unions' have already been created for the sole purpose of making collective agreements which are in particular favourable for the employer.

One of the effects of the developments is that an enterprise can be tempted to conclude a collective agreement with a union with very few members or even with a union it has established itself (a yellow union). These cases are still rare, but they happen and it is important to think such developments over.

The problem becomes especially urgent if an employer makes a collective agreement in order to be exempt from (an extended) collective agreement for the sector concerned. Fortunately, in the policy rules of the Dutch Minister for the decision of extending collective agreements and exempting collective agreements from this extended collective

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[4] For example in *Report VII, Freedom of Association and Industrial Relations,* Geneve 1947, meer recentelijk ILO, *Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee*, Geneva 2006, no. 523, p. 109.

[5] See also *Gustafsson* judgment, ECHR 25 April 1996.

[6] *Swedish Engine Drivers = Union* judgment of ECHR.

agreement, the Minister of social affairs pays attention to the independency of the union with whom the collective agreement is made for the enterprise; if the union is not really independent from the employer exemption is not awarded.

Another problem occurs if a collective agreement is concluded with a union with very few members only, while larger unions were not involved in the negotiation. As we saw, there are only few remedies against this under the Dutch rules. It is clear that such collective agreements do not satisfy the requirements following from the international instruments on freedom of trade unions and collective bargaining since these require negotiation by independent organisations. At present there are very few of such agreements and these have not lived a long life yet. Still, it is interesting to analyse the effects of such collective agreements.

First of all, the problems concern the right of negotiation of the other, the 'real' unions. If an employer wishes to negotiate with a non-representative union only, the right of negotiations of the real unions and the right of these unions to be represented are infringed. After all, if an employer negotiates with a yellow union there is no longer an independent negotiating partner of the employer; such problem does not arise if one or more of the independent unions are not involved.

If this would happen on a higher scale the *Wilson* judgment, mentioned supra, could mean that intervention by the Government becomes necessary. It could be argued that the right of the members of the larger unions to be represented is becoming illusory.

The Dutch unions complained at the ILO Committee of Experts on yellow unions. However, the Committee noticed that as yet there were no concrete cases yet and asked the Government for more information.[7] Finally the committee decided that the real problem was that the Dutch system has no system to determine the independency of negotiating partners.

One could also argue that Article 4 of Convention 98 is at stake. This article provides that measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements. If, in the Dutch situation, the negotiation process has become without meaning since a yellow union or very minor union has taken the process over, it can be said that the machinery for voluntary negotiation has become insufficient.

5. Conclusions

In this contribution I described a system which leaves large freedom for negotiation to the social partners with little government involvement. However, the law dealing with the outcomes of the negotiations is quite extensive and that may mean that if the negotiations do not work well anymore, the effects become unfavourable to the protection of workers and even contrary to international standards.

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[7] *Individual Observation* on Convention 98 in 2004.

When modern developments, such as individualization and the development of modern communication instruments, undermine the position of the traditional unions, the traditional abstention of the government from interfering in the process of negotiations may no longer be feasible. International standards may require a more active approach from the State. This analysis fits well with the description of the meaning of Article 6 of the European Charter, described in the magnum opus by Andrzej Świątkowski, *Charter of Social Rights of the Council of Europe.*[8]

Key words: The Netherlands, collective bargaining, collective labour agreements, trade unions, employers' organisations.

Prawo do prowadzenia rokowań zbiorowych: wymaga ingerencji rządowej czy powstrzymania się od działań?

Streszczenie

Autor analizuje problematykę rokowań zbiorowych i rolę układów zbiorowych pracy na przykładzie ustawodawstwa holenderskiego. Przedstawia rozwój zbiorowego prawa pracy w tym kraju oraz jego aktualny kształt. Omawia zasady prowadzenia rokowań zbiorowych, ustalania reprezentatywności partnerów społecznych oraz znaczenie układów zbiorowych pracy w systemie prawa holenderskiego. Przedstawia również standardy międzynarodowe i europejskie odnoszące się do rokowań zbiorowych. W konkluzji Autor wskazuje, że w Holandii rząd tradycyjnie nie ingerował w problematykę zbiorowych stosunków pracy. Jednocześnie stwierdza, że podobny brak aktywności może być niewłaściwy w przyszłości. Większe zaangażowanie strony rządowej może bowiem okazać się konieczne dla zagwarantowania skutecznej ochrony praw pracowniczych i zapewnienia zgodności rozwiązań holenderskich z prawem międzynarodowym i europejskim.

Słowa kluczowe: Holandia, rokowania zbiorowe, układy zbiorowe pracy, związki zawodowe, organizacje pracodawców.

[8] Andrzej Świątkowski, *Charter of Social Rights of the Council of Europe*, Alphen aan den Rijn, 2007, in particular pp. 212 ff.